IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 78 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RABARI AMRAT VISA

Versus

STATE OF GUJART

Appearance:

1. Criminal Appeal No. 78 of 1991

MR KJ SHETHNA for Petitioner No. 1-7

MR SS PATEL Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 04/05/2002

ORAL JUDGEMENT

Heard Mr KJ Shethna learned counsel at length and Mr. SS Patel learned APP.

The appellants are the original accused of Sessions Case No. 91 of 1987 tried by the ld. Addl.

Sessions Judge, Mehsana for the offence punishable under sec. 147, 148, 149, 307, 324, 323, 149 of IPC and under sec. 135 of Bombay POlice Act.

All the appellants came to be arrested for the crime registered with Patan Police Station vide CR No. I-264/1985 dated 31.10.l1985. After investigation, all the accused were charge-sheeted and committed to the Court of Sessions, Mehsana and in turn, tried by the ld. Addl. Sessions Judge, Mehsana.

Ld. Addl. Sessions Judge vide judgment and order dated 24.1.1991 convicted all the accused under sec. 147, 148 of IPC and sentenced them to suffer S/I for six months for each of the offence and convicted under sec. 324 read with section 149 of IPC and further sentenced them to suffer S/I for one year and to pay fine of Rs. 250, in default, to undergo S/I for 15 days. The ld. Addl. Sessions Judge convicted all these accused also for the offences punishable under sec. 326 read with sec. 149 of IPC and sentenced them to suffer S/I for three years and to pay a fine of Rs. 500/, in default, to undergo S/I for one month. All the acused were also convicted for the offence under sec. 323 read with section 149 of IPC and sentenced them to suffer S/I for six months. All these sentences were to run concurrently.

Brief facts of the case of prosecution is stated in para-3 of the memo of appeal and for the sake of convenience, I would like to reproduce the same as there is no dispute as to the facts stated by the appellants in para-3 of the memo of appeal.

"The complainant, his father Jethabhai and all the accused are residents of village Derasana, district Mehsana. In its sim on 31.10.1985 the complainant cultivated the agricultural land of his elder under uncle (Bha) Jesangbhai. Then he took the bullocks for drinking water on their joint bore. When he was on his way and passing by the shedha of the field of Kurshi Nathu which was cultivated by the accused no. 1, the latter caught hold of the bullocks and told him not to go by that way, as it was his way. He asked him to send his father P.W.2 Jethabhai Mahijibhai Ex. 13. He went home and narrated the facts to Jethabhai who told him that they need not go to bring bullocks back, and that they would send two persons from the village. At about 1 p.m. when he, Jethabhai and his (complainant's) sister P.W.

3 ambaben ex. 23 were taking their meals, hisanother sister Lasi was serving them. At that time acused Nos. 1 to 7 came there uttering abuses. Jethabhai went towards them and was saying "Zapo Zapo" (Pause, Pause). The complainant followed Jethabhai, Accused No. 5 who was armed with Dhariya give its blow on the portion just below Jethabhai's knee and accused No. 1 gave the stick blow on his head. He fell down. except accused 5 all other accused were armed with sticks. Accused no. 2,3,4,,6 and 7 attacked Jethabhai with sticks after he fell down. The complainant intervened to save him. Accused 6 gave the stick blows on his face. He felt giddy and fell down. They began to beat him with the sticks. Lasi and Amba and P.W. 4, Mohan rama, Ex. 24 and Zabuben came to save them. Accused ran away. P.W. 8 PHC Kansing Bhursing of Patan Police Station, Ex. 46 obtained written order ex. 21 from P.S.O. Abbaskhan that at 4.30 p.m. the Vardhi was received from the Hospital Duty Constable that in the Many Mari Jethabhai and Ghemarbhai received the injuries and were admitted into Government Dispensary. So, he should go there and record the FIR. Jethabhai was unconscious, Kansing, therefore, recorded FIR Ex. 47 of Ghemarbhai. There at the Hospital accused no. 5 was also there. But he was not able to speak. So, in the cross case he recorded the FIR of the accused 1 against (1) Ghemarbhai, (2) Jethabhai and (3) Mohanbhai Ramabhai."

This is a cross case and all these accused were witnesses of the Sessions Case No. 92/1987 tried and decided by the same ld. Addl. Sessions Judge and disposed of on the same day. It is also relevant to note that the witnesses of the present case are held guilty for the offence punishable under sec. 324 and 325 read with section 114 of IPC.

Mr. Shethna has taken me through the entire set of evidence led by the prosecution and the appreciation of the evidence made by the trial court. Along with other argument, Mr. Shethna has mainly focussed on two points. First point is that the ld. trial judge even if the case of the prosecution is accepted as it is, ought not to have convicted the accused persons for the offence punishable under sec. 326 of IPC especially when all of

them are acquitted for the offence punishable under sec. 307 of IPC and the conviction could have been awarded under sec. 325 of IPC. Ld. Addl. Sessions Judge has erred materially in holding that the stick used in inflicting the grevious hurt to the injured person with a lethal weapon. Second point, the ld. Addl. Sessions Judge ought not to have held the accused guilty of the offence punishable under any section treating them the member of unlawful assembly as the quarrel had started because of rivalary between the two groups suddenely. There was no mitigation of mind and there is no evidence of element of unlawful assembly.

It is further submitted that if this Court is satisfied that the conviction under sec. 148 of IPC is bad in law and the main conviction of the offence punishable under sec. 326 requires to be altered, then the appellants should be permitted to tender the compromise between the parties which has been arrived at on amicable settlement and no formal order of punishment may be passed.

Having considered the submissions of Mr. Shethna and Mr. SS Patel learned APP, the say of Mr. Shethna has some substance. In the present case, the weapon used allegedly used by the accused while inflicting the grevious hurt is a bamboo stock and/or a lathi. There is special description of the weapon whether it is a lathi or bamboo stick. In case of Dhanai Mahto & Anr. vs. State of Bihar, reported in JT 2000(10) SC 188, the Apex Court has held that :

"We are persuaded to accept the said contention, particularly, in view of the absence of other descriptions given to the weapons. Merely, the description of bamboo stick or lathis is not enough to make the weapons lethal or deadly. There is no case that the accused inflicted grievous hurt or attempted to inflict grievous hurt to the inmates."

In case of Joseph vs. State of Kerala, reported in AIR 1994 SC p. 34. The weapon used was only lathi and in the circumstances, the Apex Court held that it cannot be said that the accused intended to cause the death by inflicting a particular injury. While dealing with the cited case, the Apex court has observed that "the weapon used is not a deadly weapon as rightly contended by the learned counsel. (emphasis supplied).

Therefore, the conviction is altered accordingly. The accused are acquitted for the offence punishable under sec. 326 of IPC and the conviction, if any, can be recorded under sec. 325 of IPC.

Undisputedly, the learned counsel for the appellants has submitted that the weapon attributed to them canot be answered the description of deadly weapon and on facts only the bamboo stick and lathis were used.

The accused are charged of the offence punishable under sec. 307 and I am told that no formal acquittal appeal is preferred by the State. The injured Jethabhai has sustained grievous hurt on the head and this particular injury was inflicted by the stick and not by Dharia. The accused persons who were armed with Dharia are held guilty of the offence punishable under sec. 324. More or less this is a case of free fight between two and, therefore, only as submitted by Mr. Shethna, the accused of the cross case and the witnesses of the present case have been convicted by the learned trial judge. Similarly, the accused are also acquitted of the charge of the offence punishable under sec. 135 of the Bombay Police Act.

Principle of minimum liability which should have been discussed and dealt with by the trial court have not been considered and it seems that number of accused being more than five and all of them were found guilty of being assaillant they have been held guilty of the offence punishable under sec. 147, 148 and 149 of IPC.

Acquittal from the main offence punishable under sec. 307 and also the offence punishable under sec. 135 of the Bombay Police Act becomes relevant when the accused are held guilty of the offence punishable under sec. 148 of IPC, but I do not see any need to discuss in detail the arguments advanced by Mr. Shethna as he has not pressed for reasoned order by only praying that the conviction u/s. 326 IPC cannot be sustained and needs to be altered, otherwise it is doubtful that the conviction for the offence punishable with sec. 147, 148 or 149 could have sustained.

It is the case of the prosecution that original accused no. 1 i.e. appellant no. 1 had given a blow on the head and rest of the accused persons were inflicting blows with the lathis. The person who has sustained grievous injury is not a grievous injury or other serious injury which can be inflicted by any sharp cutting instrument like Dharia. The motive part pleaded by the

prosecution also becomes relevant when prosecution has amply relying upon the evidence led to prove the charge of constituting an unlawful assembly. The arguments advanced by Mr. Shethna of giving benefits of doubt to all the accused in view of the conviction imposed to the witnesses who has deposed against the present appellants and the order of conviction recorded against them is not acceptable and the finding recorded by the trial court that both the side are guilty of the criminal act is based on well founded reasons. However, the say of Mr. Shethna is accepted that conviction recorded by the trial court of the offence punishable under sec. 326 of IPC read with section 149 of IPC is bad in law. The ld. trial judge ought to have held that the offence commited by accused no. 1 is punishable under sec. 325 and not under sec. 326 of IPC.

There was no specific charge with the accused persons of the offence punishable under sec. 326 of IPC but as they were charged for the offence punishable under sec. 307 of IPC they have been held responsible for the offence punishable under sec. 326 being lesser offence.

Learned counsel for the appellants has submitted that as the accused have been acquitted of the offence punishable under sec. 326 of IPC, they may be permitted to tender the compromise arrived at between the parties and in view of the compromise pursis be acquitted from the charges proved against them. Query raised by the Court, whether the present appellants can be acquitted of the offence punishable under sec. 147, 148 and 149 of IPC being an offence of rioting and the offence against the State and not an individual.

In response to this query, Mr Shethna learned counsel has pointed out that in the decision of Ramphal & Ors vs. State of M.P. reported in (2000)9 SCC p. 61, the Apex Court had permitted the accused to enter into the compromise and compounding the offence where the accused were held guilty of the offence punishable under sec. 325 read with sec. 149 of IPC. It would be beneficial to refer the relevant part of the cited decision. In para-2 of the cited judgment, the Apex court has said that:

"The appellants were convicted under Section 304 Part II aread with Section 149, Sectin 325 read with Section 149 and Section 323 read with Section 149 by the learned trial Judge and sentenced to imprisonment for 3 years. The High

> Court in appeal set aside the said conviction under Section 304 Part II read with Sectin 149, and while confirming the conviction under Section 325/149, 323/149 and under Section 147 IPC reduced the sentence to 2 years. Neither before the original court, nor the High Court, had any application for compounding been filed. But in this case an application for compounding has been filed and it has been brought to our notice that in the counter-case, on an application for compounding having been filed, the Court has already granted permission and the matter has been compounded. The complainant-informant has endorsed in the application for compounding and the counsel appearing for them also states that the matter has been amicably settled. Taking into account the fact that the occurence is of the year 1987 and the parties have compounded the matter amongst themselves, we think, in the interest of justice, to accord permission of such compounding. We, accordingly set aside the conviction and sentence and dispose of this appeal on the basis of compromise. The accused-appellants are in custody. They may be released forthwith, unless required in any other case."

The other decision pointed out by the learned counsel Mr. Shethna in the case of M.D. Balal Mian and Anr. vs. State of Bihar & Anr., reported in 2001 AIR SCW 5190(1), where the affidavit to the effect was filed that the parties have compounded the matter and have prayed for permission to compound the matter in view of sub-section 8 of Section 320 of CrPC. The Apex Court had accepted the compromise of two accused who were convicted only under sec. 325 and 323 of IPC. The appellants were convicted of the offence punishable under sec. 325 were permitted to enter into the compromise and to compound the matter and as both the side had tendered their affidavits for the said purpose. The Apex Court recorded the compromise for compounding the offence. This decision would help the present appellants.

Other charges proved against the appellants accused are also compoundable either with or without permission of the Court i.e. under sec. 323 and 324 of IPC.

Ld. Counsel for the ori. complainant and the aggrieved parties Mr. Unwala appearing with Mr. PK Jani confirms that the parties have settled the matter and he

is also going to tender the compromise arrived at between the parties in the other criminal appeal being Criminal Appeal No. 81 of 1991 today only. It is submitted by the learned counsel appearing for the parties that this compromise arrived at much earlier as this matter was not listed for final hearing long time and could not be taken up for hearing positively, the same could not be tendered and they have instructions to tender the compromise today and in lieu thereof they have put their signatures and date. Ld. APP Mr. SS Patel has also put necessary endorsement. Mr. Patel submits that he has no objection if Court permits the parties to compound the matter. The court accepts that parties have compromised and compounded the offence without any undue pressure and with free will.

So, accpeting the compromise tendered today on record. The accused are ordered to be acquitted on account of the compromise arrived at between the parties. This criminal appeal stands disposed of. Fine if paid, be refunded to the concerned accused after proper verification.

(C.K. BUCH, J.)
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